Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of State and Local	)	
Governments' Obligation to Approve	)	
Certain Wireless Facility Modification	)	
Requests Under Section 6409(a) of the	)	
Spectrum Act of 2012.	)	WT Docket No. 19-250
	)	
Wireless Telecommunications Bureau and	)	
Wireline Competition Bureau Seek Comment	)	
on WIA Petition for Rulemaking,	)	
WIA Petition for Declaratory Ruling and	)	
CTIA Petition for Declaratory Ruling	)	WT RM-11849
	)	
Accelerating Wireless Broadband Deployment	)	
By Removing Barriers to	)	
Infrastructure Investment	)	WT Docket No. 17-79
	)	
Accelerating Wireline Broadband Deployment	)	
By Removing Barriers to	)	
Infrastructure Investment	)	WC Docket No.17-84

REPLY COMMENTS OF THE NATIONAL LEAGUE OF CITIES; CLARK COUNTY, NEVADA; COBB COUNTY, GEORGIA; HOWARD COUNTY, MARYLAND; MONTGOMERY COUNTY, MARYLAND; THE CITY OF ANN ARBOR, MICHIGAN; THE CITY OF ARLINGTON, TEXAS; THE CITY OF BALTIMORE, MARYLAND; THE CITY OF BELLEVUE, WASHINGTON; THE CITY OF BOSTON, MASSACHUSETTS; THE CITY OF BURIEN, WASHINGTON; THE CITY OF BURLINGAME, CALIFORNIA; CULVER CITY, CALIFORNIA; THE TOWN OF FAIRFAX, CALIFORNIA; THE CITY OF GAITHERSBURG, MARYLAND; THE CITY OF GREENBELT, MARYLAND; THE TOWN OF HILLSBOROUGH, CALIFORNIA; THE CITY OF KIRKLAND, WASHINGTON; THE CITY OF LINCOLN, NEBRASKA; THE CITY OF LOS ANGELES, CALIFORNIA; THE CITY OF MONTEREY, CALIFORNIA; THE CITY OF MYRTLE BEACH, SOUTH CAROLINA; THE CITY OF NEW YORK, NEW YORK; THE CITY OF OMAHA, NEBRASKA; THE CITY OF ONTARIO, CALIFORNIA; THE CITY OF PIEDMONT, CALIFORNIA; THE CITY OF PORTLAND, OREGON; THE CITY OF SAN BRUNO, CALIFORNIA; THE MICHIGAN COALITION TO PROTECT PUBLIC RIGHTS-OF-WAY; THE TEXAS MUNICIPAL LEAGUE; AND THE TEXAS COALITION OF CITIES FOR UTILITY ISSUES

November 20, 2019

EXECUTIVE SUMMARY

The record is unequivocal: the Petitions seek an expansion of current law, not clarifications of current law, and the record fails to justify any such expansion. It is rather a warning to the Commission of the legal, engineering, public safety, and common sense challenges posed by the Petitions.

Even if the record could support action, declaratory ruling is particularly inappropriate, as the Commission has provided the public with no indication of its views nor advanced any proposed rules upon which meaningful comment might be made. Compliance with the APA requires, at minimum, that the Commission make its views known on a proposed rule or action, solicit comment and then review such a record, before any action may be taken.

The Petitions seek sweeping expansions of the Commission's rules implementing Sections 6409(a) and 224, yet the limited comments supporting the Petitions gloss over the limitations of current law, rely on conclusory assumptions about what is most important, and consistently obvious problems the Petitions create. Claims that action is needed for public safety purposes or to further streamline the deployment process are refuted in the record. Demands for access to light poles ignore engineering and legal problems which all but completely negate claimed (but unsubstantiated) benefits. The Petitions seek to reduce or eliminate critical public safety protections by tying the hands of local officials charged with ensuring that construction and infrastructure work do not negatively impact public safety, and would bypass local review protected by law. While most deployment delays arise from incomplete or incorrect applications, or permits that languish awaiting contractor pickup, the Petition's supporters ignore these issues while offering no evidence, new or otherwise, to support the Petition's claims.

This record cannot support Commission action, nor would the APA permit the Commission to move forward without further action.

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I. INTRODUCTION

The National League of Cities; Clark County, Nevada; Cobb County, Georgia; Howard County, Maryland; Montgomery County, Maryland; the City of Ann Arbor, Michigan; The City of Arlington, Texas; the City of Baltimore, Maryland; the City of Bellevue, Washington; the City of Boston, Massachusetts; the City of Burien, Washington; the City of Burlingame, California; Culver City, California; the Town of Fairfax, California; the City of Gaithersburg, Maryland; the City of Greenbelt, Maryland; the Town of Hillsborough, California; the City of Kirkland, Washington; the City of Lincoln, Nebraska; the City of Los Angeles, California; the City of Monterey, California; the City of Myrtle Beach, South Carolina; the City of New York, New York; the City of Omaha, Nebraska; the City of Ontario, California; the City of Piedmont, California; the City of Portland, Oregon; the City of San Bruno, California; the Michigan Coalition to Protect Public Rights-of-Way; the Texas Municipal League; and the Texas Coalition of Cities for Utility Issues (collectively, "Localities")[1] submit these reply comments to address the record developed thus far concerning a trio of industry requests[2] ("Petitions") seeking expansions of the Commission's rules[3] implementing Sections 6409(a) of the 2012 Spectrum

[1] The following communities joined this coalition through these Reply Comments: the City of Baltimore, Maryland; the City of Burien, Washington; Culver City, California; the City of Ontario, California; and the City of Piedmont, California.

[2] Petition for Rulemaking, RM-11849 (filed Aug. 27, 2019) ("WIA Rulemaking Petition"); Petition for Declaratory Ruling filed by the Wireless Infrastructure Association, WT Docket No. 17-79 (filed Aug. 27, 2019) ("WIA Declaratory Ruling Petition"); Petition for Declaratory Rulemaking filed by CTIA, WT Docket No. 17-79, WC Docket No. 17-84 (filed Sep. 6, 2019) ("CTIA Petition") (collectively, "Petitions"). Throughout these Reply Comments, where an issue is addressed by both CTIA and WIA, they may be referred to jointly as "Petitioners;" otherwise, they will be referenced individually. Where reference is made to "Comments" of any party in this filing, the materials referenced are those filed by the named party on or about October 29, 2019, in one or more of the above-captioned dockets.

[3] 47 C.F.R. § 1.6100.

Act[4] and 224 of the Telecommunications Act.[5] In addition to the limitations placed on Commission action in this docket by the Administrative Procedures Act, the record repeatedly underscores the myriad reasons the Commission should not grant the Petitions' requests, as they are contrary both to law and to facts, extend far beyond the scope of the statute, and constitute fundamentally unsound policy.

II. THE RECORD DOES NOT SUPPORT COMMISSION ACTION OR PROVIDE ANY DATA UPON WHICH TO BASE A GRANT OF ANY PART OF THE PETITIONS.

Almost without exception, commenters supporting the Petitions' requests fail to offer specific evidence, additional information, or supportive material to substantiate the conclusory assertions of the Petitions. In many instances, commenters merely paraphrase or even directly quote, the Petitions' requests, and simply state that those changes should be adopted.[6] No data or analysis is presented – only unsubstantiated claims against largely unnamed localities and utilities. No specific factual information or outside expertise is provided in support of the Petitions. Nor is there any economic or engineering evidence to substantiate claims that the Petitions' demands will speed deployment; that absent rewrites of the Section 6409(a) rules, deployment will be inhibited; or that construction, which would fall within the expanded scope of Section 6409(a) and would raise little to no public safety or engineering issues requiring local review, is in fact the kind of insubstantial change that Congress sought to protect in enactment of Section 6409(a).

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[4] 47 U.S.C. § 1455(a).

[5] 47 U.S.C. § 224.

[6] *See, e.g.* Verizon Comments at 8-9 (repeating the Petitions' requests and simply stating that the Commission should adopt them); ExteNet Comments at 21-22. Across less than two pages, ExteNet's only proffered substantiation for its support of the Petition's assertions and requests, are citations to the Petitions themselves.

In response to the Commission's specific request for detailed, factual information, those commenters supporting the Petitions offer nothing. No record so devoid of substantial, factual information should form the basis of Commission action, particularly action by a Commission placing an unprecedented emphasis on data-driven decision-making.

In contrast, local governments have provided hundreds of pages of exhibits, including economic studies detailing the minor role local government fees and processes play in deployment; examples of improper applications submitted by providers which lead to extensive delays; expert documentation of the negative impact on property values arising from wireless deployment; and other related materials.

III. THE COMMISSION CANNOT ACT BY DECLARATORY RULING ON THE BASIS OF THIS RECORD, OR ON THE ISSUES RAISED BY THE PETITIONS.

A. Declaratory action granting any part of the Petitions is impermissible under the Administrative Procedures Act.

The Localities agree with utility and local government commenters that action by declaratory ruling would exceed the Commission's authority under the Administrative Procedures Act.[7] While declaratory action may be appropriate for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice,"[8] the Petitions seek expansions, revisions, and imposition of new rules far beyond the scope of these exceptions.[9]

The actions requested would constitute substantive rules, requiring the Commission to "exercise its legislative authority from Congress."[10] While this is particularly true with respect to the Section 224 revisions CTIA seeks, it is applicable to nearly all other aspects of the Petitions,

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[7] *See, e.g.* Edison Electric Institute et al. Comments at 28-29; Western Communities Coalition Comments at 1-3.

[8] 5 U.S.C. § 553(a)(3).

[9] *See, e.g.* Edison Electric Institute, et al. Comments at 28-29.

[10] *Id.* at 28.

as well. As detailed in Localities' initial comments[11] and throughout the record, the "proposed clarifications are, in fact, significant changes that undermine any balance struck in the *2014 Order*."[12] The Localities agree with NATOA that these changes would "effectively put land use planning for wireless facility modifications in the hands of the wireless industry and private landlords without regard for the impacts to neighboring properties, the larger community, or public safety."[13]

Where such substantial changes, and imposition of new rules, is sought, the agency must provide notice of its proposed rules, detailing the agency's own perspective on the issues, and solicit comment on that proposal.[14] As detailed in the Localities' opening comments, this necessitates the issuance, at minimum, of a Notice of Proposed Rulemaking detailing a specific proposal the Commission might contemplate.[15] As commenters note in several instances, the Petitions' requests are at times vague; it is impossible, therefore, to adequately comment on them.[16]

"This is not an adjudicatory proceeding involving two parties. Nor is it an interpretation that would not affect the interests of the parties substantially."[17] This circumstance *requires* the Commission to proffer its views and solicit further comment before any action may be taken. This is particularly true where almost all the specific evidence of allegedly problematic behavior

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[11] National League of Cities et al. Comments at 2-3 ("Localities Comments").

[12] NATOA Comments at 4.

[13] *Id.*

[14] Localities Comments at 2-3 (citing *Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977); *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995)).

[15] Localities Comments at 3.

[16] *See, e.g.* Western Communities Coalition Comments at 8-12; NATOA Comments at 6; POWER Coalition Comments at 9-10.

[17] Edison Electric Institute et al. Comments at 29.

necessitating rule changes, is anonymous in nature, and unsupported by any documentation.[18] We also share the concerns of the Western Communities Coalition that the Commission owes any community maligned in comments fair notice and an opportunity to respond, before the agency takes sweeping action based on such generalized claims.[19] "If the Commission is inclined to consider the relief requested, it must do so in an APA-compliant rulemaking."[20]

B. The Commission must recognize Petitions seek far more than "clarifications;" they ask the agency to further redefine the role of local governments in managing their communities.

The Petitions, and the record developed in response, make it increasingly clear that the intent of the wireless industry is not to seek mere "clarifications" or minor changes, but instead to push the Commission to fundamentally redefine the framework governing wireless regulation. Carriers and infrastructure providers seek to build on the 2018 Small Cell Order, moving further toward a regulatory regime under which they are entitled to use any right-of-way or vertical infrastructure that is most convenient, in their opinion, for the deployment of wireless facilities. They expect only to compensate others for costs in so doing, and expect to narrowly confine the universe of costs included, shifting the burden of constant changes in law and new deployments from themselves to taxpayers and other rights-of-way users. They expect to receive permits within tight shot clocks, and to be entitled to those permits in the event any shot clock is exceeded. They expect to be able to begin construction without ever actually receiving those permits, *even if* the facilities they intend to construct violate the law. They seek, in short, to be obligated to follow applicable laws only if someone tells them to do so soon enough after they

[18] *See* Western Communities Coalition Comments at 2-3.

[19] *Id.*

[20] Edison Electric Institute et al. Comments at 30.

make a "good faith" effort to ask permission. And they ask to be allowed to decline to pay fees associated with their projects, where they have a "good faith" objection to those fees.

Industry commenters ask for the legal right to ignore concealment of their facilities based on an after-the-fact imposition of an obligation to identify each concealment element, while simultaneously narrowly limiting those parts of an installation that can be identified as such. They ask for the legal right to ignore local zoning approval by substituting a landlord's consent to an expanded site. , And atop all that, industry asks the Commission to rewrite its rules so the industry can expand previously approved "existing sites" far beyond their original size without any discretionary local review or approval.

In exchange for these legal benefits, state and local governments, and consumers, are promised nothing. While all localities are expected to process permits under the strict rules the industry demands, industry makes no promises to any community of any new deployment. . We're told these changes are necessary to win a race to 5G, but there is no commitment, anywhere, from any industry voice, that the benefits of 5G will actually flow to most communities. Industry argues these changes are essential to promote public safety, but promises only the opportunity to buy new public safety services, while pushing local public safety regulation to the side.

Instead, the experience of most local governments is that of delay stemming from provider and contractor conduct. The Localities documented extensive experience with incomplete applications and long delays in both responding to notices of incompleteness, and collecting approved permits.[21] The Western Communities Coalition shared similar experiences, including examples of providers "submitting" applications by simply leaving them on a counter

[21] *See* Localities Comments at 26-27; Western Communities Coalition Comments at 10-11.

in town hall on a Friday afternoon, and submitting applications under names likely to confuse local officials.[22] The City of San Diego found that permits wait for contractor pick-up for an average of 129 days – more than twice the period allotted for local review under the Section 6409(a) shot clock.[23] The Localities have similar experiences to the members of the Western Communities Coalition, which found that "more than 70% of applications require at least two incomplete notices before the applicant provides all the information needed to act on the request."[24] These are real delays, lasting significantly longer than the time local governments are allotted, yet the Commission, Petitioners, and commenters ignore these issues. If the Commission wants to address buildout delays, and the industry is as committed to winning the race to 5G as it claims, addressing widespread provider misconduct would be a far more productive solution than effectively blessing even more bad behavior by granting providers and their contractors even more power.

The Commission is obligated, in all things, to serve the public interest. That interest is not one-dimensional; it is not singular. It is incumbent upon the Commission to ensure a fair and balanced regulatory framework for all participants, not to put its thumb on the scale to favor one side. The world the providers seek, through these Petitions, through the BDAC, and through legislative action at the state and federal level, is in sharp contrast to the shared sovereignty system that has defined communications policy in this nation for a century. They seek a world in which the nation's communications providers have great privileges, little to no obligations, and may grow to unprecedented size and profitability. The Commission must pursue a balanced regulatory approach, and the demands the Petitions make have no place in such a world.

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[22] *Id.*

[23] *Id.* at 5.

[24] *Id.*

IV. SOUND PUBLIC SAFETY POLICY REQUIRES INCLUSION, NOT PREEMPTION, OF LOCAL PUBLIC SAFETY EXPERTISE.

One of the central justifications WIA offers for its Petitions, repeated in its comments and in statements to the press, is that expanded Section 6409(a) rules are necessary to facilitate the deployment of FirstNet and the improvement of public safety communications. WIA President Jonathan Adelstein, in statements the press accompanying submission of its comments in these proceedings, emphasized the need for immediate action by invoking wildfires raging in California, and suggesting that lives are placed at risk due to local review of wireless installations.[25]

But history indicates more, not less, regulatory oversight of utility installations and pole attachments is required. WIA's rhetoric rests on a presumption that industry, left to its own devices, can better protect public safety than review and oversight by local code enforcement experts. WIA appears to argue that the benefits to public safety from the deployment of FirstNet and other wireless technologies, significantly outweighs any potential public safety issue that may arise from, for example, giving carriers the right to attach their equipment to street light poles never designed to support the weight of that equipment, or of rushing public safety review of Section 6409(a) permits for ever-expanding wireless sites.

Mr. Adelstein also omits the wireless industry's less than perfect record on safety. As noted by the Communications Workers of America, contractors for wireless carriers and infrastructure companies hit gas lines, cause explosions, and result in loss of life. These tragic events underscore "the need to coordinate with local officials and utilities to ensure safety in the

[25] Mr. Adelstein indicated that California was the toughest place to deploy new facilities, and that wildfires illustrate the importance of getting infrastructure sited. Communications Daily quotes Mr. Adelstein as saying: "This is not a game. Lives are at stake." Communications Daily, *Amid Fight on Revised Siting Rules, Pai Hasn't Appointed BDAC Ad Hoc Committee,* at 6 (Oct. 31, 2019).

permitting of excavation work."[26] CWA correctly notes that review includes "coordination with existing utilities, electrical issues, engineering and structural review, traffic safety and line of sight considerations, road closure permits, and building permits."[27]

But WIA and CTIA ask that these concerns be swept aside, and that for the sake of public safety, a shot clock and automatic approval be imposed on this critical public safety review. Carriers frequently submit incomplete or incorrect applications, fail to provide necessary information, or direct their materials to incorrect departments, yet as CWA notes, Petitioners ask the agency to endorse a circumstance in which "a city official has never reviewed an application, but a company would nonetheless be able to conduct sensitive and potentially dangerous work, potentially in the right-of-way and interacting with underground utilities."[28]

The people best-positioned to address these issues are local leaders. They know the needs of their communities, the unique challenges providers face in their locations, and the players involved in each area on the ground. Public safety requires *partnership* with these local leaders, not preemption of their authority to intervene. The Petitions seek to require local approval of a site, under a shot clock, with the burden falling on the City to demonstrate that a facility is problematic, rather than falling on the provider to demonstrate that their installation complies with all codes and is safe. This approach defies logic, and cannot be adopted.

V. SUBJECTING STREET LIGHT POLES TO SECTION 224 TREATMENT CREATES PRACTICAL, LEGAL, AND PUBLIC SAFETY PROBLEMS THE COMMISSION CANNOT RESOLVE.

The Localities share concerns raised and discussed at length by many utility commenters in response to CTIA's demand that the Commission expand the Section 224 pole attachment

[26] CWA Comments at 2.

[27] *Id.*

[28] *Id.* at 2-3.

regime to cover stand-alone street light poles. For the reasons outlined in the Localities' initial comments, and expanded upon below, this change is impermissible under the statute, and creates legal and operational problems the Commission cannot cure.

A. The Commission lacks the legal authority to expand Section 224 to cover street light poles.

Localities agree with many utilities that "Section 224 does not extend to light poles."[29] Section 224(a)(1) makes clear that poles "owned or controlled by utilities, **and** that are used in whole or in part for wire communications" are the only ones subject to the statute.[30] The statute was intended by Congress to extend only to "utility poles"[31] and furthermore cannot extend to street light poles because "streetlight-only poles are not used for wire communications."[32] "Light poles are used exclusively to support lights."[33]

Furthermore, Section 224's scope is limited to "distribution facilities" and light poles do not qualify as such. In *Southern Company v. FCC*, the Eleventh Circuit "rejected the Commission's expansive interpretation of the term 'pole'."[34] Of particular import is the fact that lighting assets do not distribute electricity – indeed, as the record shows, light poles often do not even receive enough power to supply a small cell, let alone sufficient power to distribute to customers. Streetlight poles "supply only light, not power."[35] And furthermore, Section 224 extends only to utility distribution systems, and the Act defines "utility" to mean "entities whose

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[29] Edison Electric Institute, et al. Comments at 5.

[30] *Id.* (emphasis in original).

[31] *See* Ameren Service Company, et al. Comments at 5-7.

[32] *See* Coalition of Concerned Utilities Comments at 10.

[33] POWER Coalition Comments at 6.

[34] Ameren Service Company, et al. Comments at 7-8 (citing *Southern Company v. FCC*, 293 F.3d 1338, 1343-46 (11th Cir. 2002)).

[35] Coalition of Concerned Utilities Comments at 10.

'poles, ducts, conduits and rights-of-way' are 'used, in whole or in part, for any wire communication.'"[36] As street light poles are, as a general matter, not used to supply communications, they are not utility poles.

The Eleventh Circuit was clear, too, that this finding was based on the plain language of the statute, and that that statute was unambiguous.[37] The decision was reached under *Chevron* step one, finding that the Act "speaks precisely to the question at issue."[38] This conclusion – that the relevant text of the Act is clear and unambiguous – binds the Commission to that interpretation under the Supreme Court's decision in *Brand X*.[39] The Commission is bound by an appeals court's interpretation of a statute where that "construction flows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[40] This is such a case, and the Commission therefore must respect the Eleventh Circuit's conclusion that the Act applies only to "distribution facilities" of which street light poles are not a part.[41]

B. Expanding Section 224 to encompass street lights would impermissibly impair contractual rights arising from both state utility tariffs and privately negotiated lighting contracts.

Street lights are not the result of the construction of utility distribution networks. In many states, electric utilities "provide light poles to customers pursuant to state utility commission-

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[36] *Id.*

[37] *See* POWER Coalition Comments at 4-5.

[38] *Southern Company v. FCC*, 293 F.3d at 1344.

[39] *See* POWER Coalition Comments at 6-7.

[40] *Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).

[41] The Localities note, and support, ample arguments raised by utilities regarding legislative history and the Commission's own precedent in interpreting this provision. The Commission is barred from taking CTIA's preferred steps not only by Supreme Court and appellate precedent, but also by clearly contradictory legislative history, and by the weight of its own precedent. *See, e.g.* Ameren Service Company et al. Comments at 5-7, 9-10.

approved tariffs."[42] This is true in Florida, Texas, and many other states. As described in the Localities' opening comments and in several utilities' comments, street light poles are placed pursuant to standardized agreements governed by those tariffs. Street lights are "often specifically chosen by the customer to meet decorative or aesthetic objectives"[43] and may be placed, removed, or relocated at the direction not of the utility, but of the lighting customer. These agreements, furthermore, "do not contemplate attachment of wireless antennas to the light poles."[44] It is not within the discretion of the utility that operates the poles, and the FCC "could not mandate access to such light poles, nor regulate the rates, terms and conditions of access, without intervening in a state-sanctioned contract between an electric utility and its customer."[45]

In other states, where tariffs do not govern lighting, the street lights are nevertheless governed by contracts negotiated privately between utilities and lighting customers, including municipalities and HOAs.[46] "FCC regulation of light poles under these circumstances would impinge upon the contract rights of the customers."[47] Regardless of whether the poles in question are installed under tariffs or under a private contract, "the decision of whether to allow the collocation of wireless equipment on a street light pole is therefore not within the sole discretion" of a particular utility, "even when [that utility] owns the street light pole in question."[48]

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[42] POWER Coalition Comments at 8.

[43] Ameren Service Company et al. Comments at 11.

[44] POWER Coalition Comments at 8.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 12.

[48] Xcel Energy Comments at 6.

Finally, neither utilities nor the Commission has the power to grant access to the property on which many street light poles exist. Alabama Power Company, for example, owns "approximately 152,000 structures used primarily to support street and outdoor area lights, approximately 113,000 of which are located on private property."[49] The Commission has previously acknowledged that "pole attachment rights under Section 224 are subject to such property rights as may exist, and which are available to the attaching entity."[50] In the vast majority of circumstances, therefore, expansion of the Section 224 regime to cover light poles would not actually grant access to those poles, as the Commission cannot compel private property owners to grant access, nor can it compel utilities to convey rights they do not possess.

C. For aesthetics, engineering, and public safety reasons the vast majority of street light poles cannot support wireless equipment.

Even if the Commission had the legal authority to expand Section 224 in the manner CTIA requests, and even if the Commission had the authority to interfere in state-sanctioned tariff-governed contracts or private party contracts, or the authority to grant access to poles located on private property, the record clearly demonstrates that the vast majority of street light poles cannot support wireless equipment, for reasons of aesthetics, engineering, and public safety. "The vast majority of lighting support structures will require complete replacement in order to accommodate small cell and other wireless antenna installations."[51]

Light poles of particular designs are selected by lighting customers in large part due to their aesthetic appearance.[52] These poles are "often designed to meet certain visual and aesthetic requirements" but "do not have the structural capacity or capability to support wireless

[49] Ameren Service Company et al. Comments at 11.

[50] POWER Coalition Comments at 12.

[51] Ameren Service Company et al. Comments at 12.

[52] *See* Xcel Energy Comments at 6.

communications facilities."[53] These light poles "come in all different shapes, sizes, and materials" and "vary greatly in height and girth […] and are typically not as strong as wood distribution poles."[54] These poles "are not load rated for any additional attachments other than lighting" in most cases, and as a result "accommodating the attachment of [wireless] facilities would require replacement of the pole and potentially the pole's foundation to support the wireless facilities."[55] In short, "lighting support structures – unlike distribution poles – are not generally suitable for third-party attachments."[56] Placing facilities on street lights is "not as simple as declaring that such support structures are 'poles' within the meaning of Section 224."[57]

Even if street light poles were designed to support the weight of wireless facilities, and were designed to support wireless facilities without compromising the aesthetic choices associated with their installation, the fact is most street light poles cannot support wireless equipment without violating applicable safety codes. Street light poles "were not designed or installed to provide access for fiber, to mount equipment, to disconnect power, or to provide necessary National Electrical Safety Code clearances, all of which wireless attachments require."[58] Most streetlights lack "separate raceways in which to run communications fiber separate from electric power, as required by NESC."[59]

And furthermore, the power supplies to street lights often cannot supply enough power to run wireless equipment. "Dedicated street light poles are generally fed by underground electric

[53] Xcel Energy Comments at 5-6.

[54] POWER Coalition Comments at 9-10.

[55] Coalition of Concerned Utilities Comments at 12.

[56] Ameren Service Company et al. Comments at 11.

[57] Id. at 12.

[58] Coalition of Concerned Utilities Comments at 13.

[59] *Id.*

lines, and the existing feeder to the street light pole is generally rated to carry only the level of power necessary for the street light."[60] As a result, "considerable construction activity is required to install the electricity supply equipment."[61] This could include installation of new transformers, likely in a neutral space. "Sidewalks, streets, parking lots and rights-of-way must often be torn up, removed, and replaced in order to install new electric service to the pole."[62] The same is often true for fiber backhaul, as streetlights are not already wired for fiber. New foundations must be installed, and addition of new power supplies "could potentially require excavation or even the installation of a new transformer."[63]

The reality, in sum, is that the Commission cannot expand Section 224 to encompass street light poles; cannot impair private contracts or tariff-governed agreements or compel third parties to approve use of poles they selected; and in any event, the poles CTIA asserts it needs, cannot support any wireless facilities without outright replacement and extensive associated construction activity. CTIA's request cannot be granted.

VI. THE RECORD REFLECTS NUMEROUS ISSUES WITH PARTICULAR REQUESTS ADVANCED IN THE PETITIONS.

In addition to the myriad problems with the Petitions' requests described in the Localities' initial comments, the comments of other parties raised several additional problematic elements of the Petitions that warrant further discussion.

[60] Xcel Energy Comments at 7.

[61] Coalition of Concerned Utilities Comments at 14.

[62] *Id.*

[63] Xcel Energy Comments at 7.

A. No Commission action is warranted with respect to fees.

As noted in the Localities' initial comments, allegations with respect to fees remain largely unsubstantiated, or are outright incorrect.[64] WIA's comments, for example, make reference to a "Town of Goffstown, New York"[65] – a cursory search of public records and the internet reveals no such town exists, though a Goffstown does exist in New Hampshire. No evidence is proffered to support the fee-related assertions WIA levels at *any* locality, however. The Commission cannot base action on fees on this record.

WISPA nonetheless goes further, evidently asking that the Commission not only address permit processing fees, as the Petitions suggest, but also target fees for collocation on property outside the rights-of-way. WISPA alleges, for example, that it is problematic for an unnamed city in Minnesota to charge a rental fee to attach to a water tank, when that city had not charged a fee for attachment of public safety communications equipment.[66] WISPA also cites, as an example of allegedly bad conduct warranting action, that localities "refused to consider requests by WISPs to access infrastructure that already supported communications equipment installed by the local government", suggesting WISPA believes some obligation exists on the part of localities to make all their property, and all their structures, available for private for-profit use wherever desired at the same rate they use such property for public safety purposes.[67]

Crown Castle takes the position that fees for reviewing Section 6409(a) requests should generally be minimal, as "the existing tower or base station has, by definition, already been

[64] *See* Localities Comments at 21-24.

[65] WIA Comments at 8.

[66] WISPA Comments at 10.

[67] *Id.* at 9.

reviewed and approved."[68] But elsewhere, Crown Castle supports redefining the scope of the existing site or base station based *not* on what was originally reviewed and approved as a wireless site, but instead as the entire structure, and whatever expanded site the landlord and Crown Castle have later negotiated.[69] These positions are fundamentally inconsistent. If the existing site is, as the Commission represented to the Fourth Circuit, only that area already subject to local review and approval,[70] then expansion of the site by private contract, bypassing local review, is not entitled to Section 6409(a) protection. But if that protection is warranted, then review must be more than the minimal review, as it involves areas not previously subject to review and approval. As detailed in the record, review of Section 6409(a) applications, particularly if the process is expanded to compel simultaneous review of all relevant permits, is far from simple. Localities are already limited to recovery of their costs for zoning or permit applications by operation of state and local law in almost every state;[71] the reality is, however, that the real costs of review (which the Commission has never studied) significantly exceed the amounts the industry believes it should have to pay.[72]

B. Many aspects of a site, including dimensions, location, setbacks, and location of components, contribute to concealment.

The record describes in detail the holistic approach to concealment which local governments have taken for decades in working collaboratively with wireless companies to

[68] Crown Castle Comments at 36-37.

[69] *Compare id.* at 36-37 *with id.* at 18.

[70] *See* Brief of Respondents Federal Communications Commission, *Montgomery County v. FCC*, Nos. 15-1240 & 15-1284, Docket No. 61, at 3 (2015) ("FCC Respondents Brief") (The Commission "interpreted the term 'existing' in Section 6409(a) to limit the statute's reach to facilities that had previously been reviewed and approved by a State or local government…").

[71] *See* Localities Comments at 22.

[72] *See id.* at 21-24.

manage infrastructure deployments.[73] Concealment does not stem solely from purpose-built shrouds and stealth facilities, but also from limitations on height, from setbacks, from color, from location, and from the dimensions of many components of each wireless facility.[74] "Hence, changes in size and scale can defeat concealment elements by undermining the concealment of the structure."[75] The Localities share the view that "whether a modification defeats the concealment elements must properly address individual aspects of concealment in addition to the concealment context as a whole."[76] Changes to size and scale, and changes to placement of equipment on a structure, can substantially impact concealment, and the unduly narrow interpretation urged by Petitioners would render the protection for concealment elements meaningless.

C. Localities correctly apply the law when they treat the "current site" as the lease area at time of original review and approval.

Several commenters complain that "jurisdictions are limiting the 'current site' to the originally approved lease area."[77] They argue instead that a statute which grants rights only to modify a facility that was previously reviewed and approved, should extend its protections to whatever lease amendment is later negotiated, even if the expanded area was not subject to any review or approval.[78]

This complaint is unfounded, and in fact reflects an interpretation of Section 6409(a) which stands directly at odds with the Commission's own interpretation as expressed before the

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[73] *See* Western Communities Coalition Comments at 30-39.

[74] *Id.* at 30-31.

[75] *Id.* at 31.

[76] *Id.* at 32.

[77] Crown Castle Comments at 18.

[78] *Id.*; *see also* AT&T Comments at 19.

Fourth Circuit. As detailed in the Localities' opening comments,[79] the Commission viewed the statute as defining "existing" to extend only to the site originally subject to discretionary review and approval.[80] That Crown Castle and others would prefer to bypass local review is of no significance – the statute, and the Commission's own understanding of its language, is unequivocally to the contrary.

D. Expanding the scope of the Section 6409(a) shot clock to encompass all building and other permits is inconsistent with the Commission's own interpretations of the statute.

Several commenters support the Petitions' request that the Section 6409(a) shot clock be expanded, granting them access to a "deemed granted" remedy compelling issuance of not only a siting approval, but also building, electrical, and traffic safety permits based solely on the passage of time and without regard to whether the plans actually comply with applicable codes.[81] Even assuming the Commission could undermine its conclusion that localities have the right to enforce codes of general applicability by granting this request, several problems arise when examining the justifications for this expansion.

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[79] Localities Comments at 10

[80] *See* FCC Respondents Brief at 3 (The Commission "interpreted the term 'existing' in Section 6409(a) to limit the statute's reach to facilities that had previously been reviewed and approved by a State or local government…"); *see also id.* at 14 ("a zoning authority 'is not obligated to grant a collocation application under Section 6409(a)' unless the wireless tower or base station has previously been 'reviewed and approved under the applicable local zoning or siting process' or received 'another form of affirmative State or local regulatory approval.'") (quoting *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report & Order, 29 FCC Rcd 12865, ¶174 (2014), *aff'd, Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015)).

[81] *See, e.g.* Verizon Comments at 8; ExteNet Comments at 21; AT&T Comments at 12-14.

Several commenters allege, for example, that expanding the shot clock to cover all approvals will have minimal impact, as the review associated with Section 6409(a) facilities is minimal.[82] This argument fails for two reasons.

First, commenters argue the necessary scope of review is limited, as the original sites were already subject to extensive review, so collocation or replacement of equipment (as permitted by Section 6409(a)) should not raise significant additional issues.[83] This presumption is not only unsupported, but it stands in direct conflict with the Petitions' request that Section 6409(a) extend to ground lease areas, and portions of structures, which *were not* previously reviewed. It defies logic to argue for rapid review on the basis of prior evaluation, while seeking to bypass that prior review process by expanding sites.

But even if that approach were logically sound in the context of the Petitions' other requests, it nevertheless rests on the presumption that review of the *original equipment* necessarily carries over to, and encompasses, review of the equipment the provider now seeks to add. That is not how permit review works. Structural integrity, for example, is evaluated based on what is proposed at the time – what is in front of the reviewing authority. Whether or not a given tower was previously approved to support ten antennas, does not demonstrate that it necessarily can support twelve – a fresh evaluation is needed. Adding a six-foot armature to a utility pole in the rights-of-way is a very large expansion relative to the size of the pole, as is the addition of a 10-foot extension atop a 25-foot utility pole, yet neither of these constitute a substantial change. The engineering review associated with the first wireless facility on the site would not have contemplated such a massive expansion, and the Commission cannot conclude

[82] Crown Castle Comments at 36-37.

[83] *See id.* at 36.

that the need for further review is minimal based on what has come before. To do so would compromise public safety.

VII. CONCLUSION.

For all the foregoing reasons, the Commission should reject the Petitions' requests for significant expansions to the scope of the Section 6409(a) framework and Section 224's pole attachment regime.

Respectfully Submitted,

/s/ Gerard Lavery Lederer

Michael J. Watza
KITCH DRUTCHAS WAGNER
VALITUTTI & SHERBROOK
One Woodward Avenue
Suite 2400
Detroit, MI 48226
Counsel to the Michigan Coalition to Protect Public Rights-of-Way

Gerard Lavery Lederer
Joseph Van Eaton
Gail Karish
John Gasparini
BEST BEST & KRIEGER LLP
2000 Pennsylvania Avenue N.W., Suite 5300
Washington, DC 20006
Counsel for the Localities

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